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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 847

ARTHUR ACUNTO, CARMINE PAONESSA and MARIO STEFANO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HENRY J. BOITEL,
Of Counsel.

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UNITED STATES OF AMERICA,
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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Arthur Acunto, Carmine Paonessa and Mario Stefano, jointly pray that a writ of certiorari issue to review the judgment, as to each of them, of the United States Court of Appeals for the Second Circuit, pronounced on September 17, 1969 and entered on October 15, 1969 (Appendix A hereto, *infra*, pp. A1-3).

Opinion Below

The judgments of conviction of these petitioners were affirmed by the Court of Appeals without opinion. Three other defendants, named in the indictment, were tried separately and convicted. The two cases were consolidated for purposes of appeal. As to those three other defendants, the Court of Appeals affirmed the convictions of each in an opinion dated October 15, 1969, reported under the title *United States* v. *Edward Baker*, —— F. 2d ——.

Jurisdiction

The judgment of the Court of Appeals was entered on October 15, 1969 (Appendix A hereto, *infra*, p. A3).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. (As to all three Petitioners.) In a criminal case, where the jury is aware that one of the defendants on trial was previously tried and acquitted in a New York State court upon charges arising from the precise circumstances

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* Although we have characterized judgment as having been "entered" on October 5, 1969, an explanatory note is necessary. The original indictment in this case listed twelve defendants, and, at the motion of the Government, the case was severed and two separate trials resulted. These three petitioners were the only defendants in one of those trials (*United States* v. *Acunto, et al.*). Both trials resulted in convictions and in appeals. The two cases were consolidated for appellate purposes, and were argued upon the same day, and, for docket purposes, the office of the Clerk of the Court of Appeals treated them as one case, under the title *United States* v. *Acunto, et al.*

The argument in the instant case resulted in an affirmance from the bench. The argument in the other case resulted in an affirmance, with an opinion, under the title, *United States* v. *Baker, et al.*, —— F. 2d ——, dated October 15, 1969. Shortly thereafter, counsel for the petitioners herein (the only ones he represented), received notice that judgment as to these petitioners had been entered on October 15, 1969. This was the first and only notice he received.

On October 28, 1969, counsel for the Government indicated to counsel for the petitioners that the Clerk's office had been in error, and judgment should properly have been entered on September 17, 1969, the date of the oral affirmance from the bench. In order to eliminate any cloud, the Petitioners herein moved in the Court of Appeals on October 29, 1969, for a declaration that the date of entry be deemed no earlier than October 15, 1969. Indeed the actual physical entry upon the general docket of the Court was not made until after October 29, 1969. In its answering papers, the Government did not oppose this requested relief. As this petition goes to press, the Court of Appeals has not yet decided the question.

upon which the present Federal prosecution was based, was it prejudicial error for the prosecutor, over objection and without immediate correction from the Court, to state in summation to the jury: "I tell you this: Roland Warren gave you a chance to do what the Kings County Jury didn't do and you should not miss it."?

2. (As to the Petitioner, Arthur Acunto.) Where the only evidence against a defendant is that, only after the crime was accomplished by others, he was requested to and did make a payment of money to certain of the perpetrators in behalf of his brother, an alleged perpetrator, should the verdict of the jury have been set aside in that it convicted the defendant of the substantive offense, theft from interstate commerce (18 U.S.C. 659), but acquitted him of conspiracy? (18 U.S.C. 371). May one aid and abet the commission of a crime (18 U.S.C. 2) after the crime charged is a completed fact?

Constitutional Provisions and Statutes Involved

This case involves the due process clause of the Fifth Amendment of the Constitution of the United States.

With regard to the crimes charged against the Petitioners in the indictment, the relevant statutory provisions are: Title 18 United States Code § 2 (aiding and abetting), § 371 (conspiracy) and § 659 (theft from interstate commerce). These Constitutional and statutory provisions are quoted in Appendix B, hereto, *infra*, pp. A4-7 *et seq.*

Statement of the Case

These three Petitioners, together with nine others, were charged in an indictment of five counts arising from the theft of a motor truck containing a shipment of merchandise which was in interstate commerce. The full text of the

indictment is set forth in Appendix C hereto, *infra*, pp. A8-12 *et seq.* These Petitioners are named as defendants only in Counts One and Two. Count One charged them and the nine others with conspiracy to violate 18 U.S.C. § 659 (theft from interstate commerce), § 2312 (transportation of stolen motor vehicle), § 2314 (transportation of stolen goods, § 2315 (receipt, concealment or sale of stolen goods). Count Two charged them with the theft of a motor truck containing an interstate shipment of women's garments (18 U.S.C. § 659).

The Government's Case

On the evening of October 6, 1966, in Manhattan, a truck driver was moving a truckload of women's garments destined for various points in the State of Michigan. When the truck stopped for a red light, two men boarded the truck and took control. They drove to Brooklyn, New York, where the driver was taken from the vehicle, slugged and left unconscious. Shortly thereafter, he notified the police (TR 19-26).* None of these Petitioners were alleged to have been involved directly in this phase of events, other than through the conspiracy theory.

At 5:00 A.M., two New York police officers were on motor patrol in a warehouse and vegetable market district in Brooklyn. They observed the Petitioner, Carmine Paonessa, turning off the lights of what later turned out to be the stolen truck. They asked him for his driver's license and the truck's registration. He responded that the driver of the truck was at a nearby diner. One of the officers then realized that this was the stolen truck about which they had earlier received a report. They arrested Paonessa, and he explained that his only connection with the truck was that he had been approached earlier by three

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* "TR" refers to the stenographic transcript of trial proceedings. "SA" refers to Petitioner's Supplemental Appendix in the Court of Appeals.

men who hired him to unload the truck. The men left him at the truck and went for coffee (SA. 134-143, 150, 151-56).

The officers were unable to locate the men at the diner (SA. 140-41, 153-54). Paonessa was continued in custody. He was eventually tried and acquitted in the Kings County Supreme Court upon the charges growing out of this arrest: criminally receiving stolen goods and possession of stolen goods (SA. 170).

Aside from the testimony of the police officers, which implicated only Paonessa, there was just one other notable prosecution witness, Roland Warren. Warren was named as a defendant in the indictment, and he testified that he had been the hijacker who had driven the truck to Brooklyn, and that a second defendant, Robert Hicks had been with him on the venture. They did this at the prompting of a third defendant, Joseph Roselli, who told them that he had some people in Brooklyn "who were interested in a load of clothing" (SA. 4). Warren claimed that thereafter, on October 4th or 5th, 1966, he met two of the Petitioners, Paonessa and Stefano, together with Roselli and certain of the other defendants at an eating place in New Jersey. Warren was there instructed that once he had possession of the truck he was to take it to a certain place in Brooklyn (SA. 13-17). He testified that the Petitioner Stefano gave him the number of an outdoor telephone booth which Warren was to call when he was on his way with the vehicle (SA. 11-20, 92-93).

The choice of the truck and the date of the event appear to have been left to Warren's discretion, according to his testimony. On the evening of October 6th, the events took place as allegedly planned and as outlined above. The spot in Brooklyn was reached at about 2:00 A.M., and Warren claims to have met the Petitioner, Stefano, at a point nearby, together with certain others of the defendants (SA. 24). (It is to be noted that the point in Brooklyn where these last events allegedly took place is quite

distant from the place where the police officers later found the truck [SA. 135].) Warren testified that he later saw the Petitioner, Paonessa pulling away with the truck (SA. 26).

To this point, there has been no involvement by the Petitioner, Arthur Acunto. After leaving the truck and meeting the others nearby, Warren allegedly asked Stefano, "What about the money?" (SA. 24). Stefano responded by telling Panepinto, another defendant, "you know where my brother lives, go by there and tell him to give you guys some money" (SA. 24-25). He also said that more money would be forthcoming once they finished counting up the merchandise (SA. 26-27). At Stefano's brother's residence, Panepinto got out of the car and rang the bell for the brother's apartment. The brother, Arthur Acunto, came down. Panepinto told him, "Mario sent us around here, sent me around here to get some money for these guys" (SA. 27). Acunto asked, "where is Mario," and Panepinto answered, "He is at the drop," whereupon Acunto inquired, "He did get the load?", and was told that that was the case (SA. 27-28). Acunto went back into the apartment house and returned with $300 which he gave to Panepinto saying "This is all the money I have," and that there would be "more tomorrow, after they . . . count the stuff up" (SA. 28).

Cross-Examination of Warren

On cross-examination, Warren stated that he had been arrested in this case in December, 1966. He admitted that he had been confined to a mental institution in 1956 (SA. 31-32). When first interviewed by the FBI, he had held back information from them (SA. 31-33). He was not sure how many additional indictments were then pending against him in Federal Court, but he believed there were three (SA. 45).

A letter, written by Warren, was introduced into evidence and marked Defendant's Exhibit A. In that letter, he characterized the trial prosecutor as being "my attorney" (SA. 44).

He admitted that he did not know Petitioner Acunto, and the only time he had ever seen him was at 2:00 A.M. on October 7, 1966 (SA. 69-70. As the cross-examination proceeded he admitted that he had lied to the FBI concerning a number of matters during the investigation of this case (SA. 106-107), and, notwithstanding his denials, it became clear that in exchange for his testimony in the present case, he expected consideration to be given to him upon his sentence in the present case and in the other three pending matters against him (SA. 127-133). He eventually admitted that he had hijacked at least six (6) trucks from interstate commerce (SA. 133).

Defense Motions at End of Prosecution's Case

At the end of the prosecution's case, the attorneys for each of the Petitioners moved for a directed verdict of acquittal. Those motions were denied (SA. 163-165).

The Defense

Testimony of Petitioner, Carmine Paonessa

Petitioner Paonessa testified as a witness in his own behalf. He denied driving the truck in question, and denied knowing the witness, Roland Warren (SA. 166-167), and related essentially the same state of facts which he had given the police on the night of his arrest, concerning his innocent reasons for being found by the truck. His prior trial in the New York State court, arising out of the same state of facts, resulted in a jury verdict of acquittal (SA. 170). On cross-examination, he testified that at the time of the events in question he was employed, on a full time basis—five days per week—by the Richman Excavating Co.,

and was working in Staten Island (SA. 183). He had been regularly employed for the prior twenty (20) years (SA. 169).

Testimony of Petitioner, Mario Stefano

Petitioner Stefano testified as a witness in his own behalf. He had never been convicted of a crime, and he was the brother of Petitioner, Arthur Acunto (SA. 193-194). He denied knowing the witness, Roland Warren, and denied every material allegation of Warren's testimony (SA. 194-196). At the time of the events in question he was in the trucking business and owned a substantial amount of trucking equipment (SA. 197-198).

Reasons for Granting the Writ

I. (As to all three Petitioners.) Since the jury was aware that one of the defendants had been previously tried and acquitted in a New York State court upon charges arising from the precise circumstances upon which the present Federal prosecution was based, it was prejudicial error for the prosecutor, over objection and without immediate correction from the Court, to state in summation to the jury: "I tell you this: Roland Warren gave you a chance to do what the Kings County Jury didn't do and you should not miss it."

It is urged that this question is appropriate for certiorari review due to the high incidence of successive state-federal prosecutions concerning essentially the same subject matter, while technically involving different crimes. We are not aware of any case in which this Court has had the opportunity to pass upon the particular type of comment made in the instant case by the prosecutor. We respectfully submit that it should be made clear that such comment falls within that category of holdings by this

Court which declare that such prejudicial assertions by a prosecutor may vitiate a jury verdict. *Graves* v. *United States,* 150 U. S. 118 (1893); *Hall* v. *United States,* 150 U. S. 76 (1893); *Williams* v. *United States,* 168 U. S. 382, 18 S. Ct. 92, 98 (1893); *Viereck* v. *United States,* 318 U. S. 236, 248 (1897); *Berger* v. *United States,* 295 U. S. 78, 84-89 (1935); *see also: Griffin* v. *California,* 380 U. S. 609 (1965); *Chapman* v. *California,* 386 U. S. 18 (1967).

This is particularly so in a case such as the present one, were two of the petitioners testified in their own behalf and denied the charges against them, and the prosecution's case depended completely upon the admitted hijacker of the truck, who had a lengthy criminal background, a psychiatric history, and powerful reasons to ingratiate himself with the prosecutor due to four pending federal indictments against him. In such a case, the type of comment here complained of could well swing the balance, unfairly, in favor of the prosecution.

The setting in which the prosecutor's comment took place was as follows:

During the cross-examination of Police Officer Wood, it was revealed to the jury that he had testified in the New York prosecution which had resulted from Wood's arrest of Paonessa (SA. 143). Defense counsel then sought to determine, from Wood, the disposition of that State case. The Trial Court permitted this line of inquiry over the objection of the prosecutor (SA. 144-145).

Thereafter, when the petitioner Paonessa testified, it was revealed, without objection, that he had been acquitted in the State case (SA. 170).

In his summation, the prosecutor sought to counterbalance the above revelations by a clearly improper and intensely prejudicial means:

> (The Prosecutor:) "* * * This was a short case, and I don't believe that there is really any necessity to go

over the testimony in any greater detail than I already have.

"I tell you this: Roland Warren gave you a chance to do what that Kings County jury didn't do, and you should not miss it.

(Defense Counsel:) "Your Honor, I think that is absolutely improper. I respectfully ask your Honor to withdraw a juror, declare a mistrial.

"The Court: No. That comes under the head of argument. You argued about the Kings County jury. Your adversary rose to the bait. We will just leave it in the position where each lawyer is expressing his contentions and views.

"The jury will be guided solely by evidence and not by argument or contentions or any other influences in this case except the testimony as it was elicited from the witness stand.

(Defense Counsel:) "I move for the withdrawal of a juror and a declaration of a mistrial on the ground the United States Attorney has impugned the jury not on the evidence but on prejudice and suspicion and things outside the case.

"The Court: I am instructing this jury that they must do their sworn duty, attending solely to the evidence in this case, and they will disregard all remarks, contentions, soliloquys and protestations of anybody other than witnesses and evidence in the case.

"Your motion is denied." (SA. 233-234)

It is worthy of note that the quoted words of the prosecutor were those with which he chose to close his argument. They were his very last words to the jury. The peak of his argument was to thrust upon the jury the obligation to convict these Petitioners, not only upon the evidence in the case, but also in reparation for the failure of the State court jury to bring in a conviction.

Rather than immediately correcting this grossly prejudicial appeal to the jury, the Trial Court practically reprimanded defense counsel for raising the objection, treated the whole thing like a good natured jousting match and merely instructed "*this* jury that they must do *their* sworn duty" (emphasis is added). While clearly unintentional, this instruction fit neatly into the logic urged upon the jury by the prosecutor, and the two together could well have produced the following effect: "This jury must do their sworn duty, even if the other jury did not do so."

The jury was then released for the luncheon recess, and thereafter, was given the Court's charge. Apparently, having given further thought to the impropriety of the prosecutor's statements, the Court then made an attempt to correct the situation: "I repeat to you again, any remarks of the United States Attorney which might indicate that you divert your attention from the evidence here to any other subject or any other case are out of order, and you should pay no attention whatsoever to that kind of talk." TR. 278.

It is most doubtful that this late, specific directive could remedy the harm already done.

It is respectfully urged, that as a matter of law, and upon the facts of the instant case, the assertion by the prosecutor to the jury deprived the Petitioners of a fair trial in violation of the Due Process requirements of the Federal Fifth Amendment.

II. (As to the Petitioner, Arthur Acunto.) Since the only evidence against the Petitioner was that, only after the crime was accomplished by others, he was requested to and did make a payment of money to certain of the perpetrators in behalf of his brother, an alleged perpetrator, the jury verdict should have been set aside in that it convicted the Petitioner of the

substantive offense, theft from interstate commerce, but acquitted him of the conspiracy charge. One may not aid and abet the commission of a crime after the crime charged is a completed fact.

It is urged that the question here raised is appropriate for certiorari review due to its importance to the administration of justice in the Federal Courts. It is frequent that Federal indictments charge a number of defendants in a wide ranging conspiracy count and a number of substantive counts. Absent the conspiracy count, certain defendants could only be found guilty upon a theory of aiding and abetting the commission of the substantive offense. This case presents the Court with the opportunity to clarify and preserve the difference between conspiracy and aiding and abetting.

Each of these three Petitioners were charged only in Counts I and II of the indictment.

Count I charged them with conspiracy to violate 18 U.S.C. § 659 (theft from interstate commerce), § 2312 (transportation of the stolen truck), § 2314 (transportation of the contents of the truck) and § 2315 (receipt, concealment or sale of stolen goods). Appendix C hereto, *infra*, pp. A8-A10. Petitioners Paonessa and Stefano were convicted of this count, but the Petitioner Acunto was acquitted of it.

Count II charged the three Petitioners with the theft of a motor truck containing an interstate shipment of garments (18 U.S.C. § 659), and aiding and abetting the same (18 U.S.C. 2), *infra*, pp. A10-A11. The jury convicted all three Petitioners of this charge.

The problem here is raised by the jury's action in acquitting Acunto of Count I (conspiracy), while convicting him of Count II (simple theft). It appears to be settled

law that consistency is not necessary in a verdict upon an indictment charging both conspiracy to commit the substantive offense and the substantive offense, itself, *Dunn* v. *United States,* 284 U. S. 390 (1932), and see annotations at 53 ALR 2d 622, 18 ALR 3rd 259; *but compare: Sealfon* v. *United States,* 332 U. S. 575 (1948). However, the fact of acquittal of the conspiracy count operates to remove the conspiracy rationale as a means of justifying conviction upon the substantive count. Since a conspiracy is an agreement, and an agreement is the alignment of two or more minds, a jury may depend upon very subtle intangibles to conclude the existence of a conspiratorial agreement. By his acquittal upon the conspiracy charge, these elements have been removed from consideration as to the Petitioner, Acunto, and the substantive charge of theft must stand on its own two feet, or at least be held up by the crutch of "aiding and abetting" (18 U.S.C. 2).

Upon the evidence in this case, there can be no conclusion that the Petitioner, Acunto, directly participated in the theft of the motor vehicle and its contents. The truck had been hijacked, it had been delivered to the "people in Brooklyn", and they, in turn, allegedly, turned it over to one of their henchmen who was driving it away, before the Petitioner, Acunto, entered the picture in any manner whatever. It is only at that point that one of the original hijackers states to Stefano (Acunto's brother), "What about the money?", and Stefano responded by telling one of the other defendants, "You know where my brother lives. Go by there and tell him to give you guys some money." The henchman brought the two original hijackers to Acunto's apartment house, rang the bell, and Acunto came down. He was then informed, "Mario sent us around here, sent me around here to get some money for these guys." There is no hint in the record of any prior expectation by Acunto of performing this function. Acunto replied, "Where is Mario?" and is told "He is at the

drop." Acunto then inquired "He did get the load?" and was told that was the case. He then went back into the apartment house and returned with $300 which he gave to the other party, stating, "This is all the money I have" (SA. 24-28).

The question, therefore, is whether, by any reasonable standard the jury could have found that Acunto aided and abetted the theft (and only the theft, since that was the only charge of Count II) of the motor vehicle.

The jury was clearly troubled about the case against Acunto; they twice came back for further instructions or information from the Court. The first time, they asked "We know that one of the counts was conspiracy. What exactly is the other count? (TR. 313). The Court thereupon charged at length concerning aiding and abetting (TR. 313-316).

The second time, the Court stated the jury's request as follows: "The jury has requested the conversation with Warren where Acunto allegedly paid a sum of money to Warren." That conversation was read to them (TR. 316-317).

In *Nye & Nissen* v. *United States,* 336 U. S. 613, 619 (1949), this Court said, quoting Judge Learned Hand in *United States* v. *Peoni,* 100 F. 2d 401, 402 (2nd Cir., 1938):

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that *he wishes to bring about,* that he seek by his action to make it succeed.'" (emphasis added)

It is clear, therefore, that the actions of one who aids and abets are geared to the wish that something which is happening or which is going to happen will be successful; the

concept has no relevance to that which is already an accomplished fact. The violation of 18 U.S.C. 659 was already complete by the time Acunto entered the picture. The "adverse, independent, absolute possession" of the stolen items was already in the hands of the others. *United States* v. *Cohen,* 274 F. 596, 597 (3rd Cir., 1921). The act of paying some money to the original hijackers in no way enhanced that possession—the truck was not even any longer in the area where the original hijackers had brought it to.

In *Scales* v. *United States,* 367 U. S. 203, 224-225 (1961), it was held that:

> "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment."

See also, United States v. *Falcone,* 109 F. 2d 579 (2nd Cir., 1940), aff'd, 311 U. S. 205.

We respectfully submit, therefore, that the conviction of the Petitioner, Arthur Acunto, upon the theft alleged in Count II, was without evidentiary basis, was a misconstruction of 18 U.S.C. 2, and was thus in violation of the Due Process Clause of the Fifth Amendment.

CONCLUSION

For all of the above reasons, the writ of certiorari should be granted as to each of the Petitioners; the judgments of conviction entered against the Petitioners Mario Stefano and Carmine Paonessa should be reversed and a new trial ordered as to each of them; the judgment of conviction entered against the Petitioner Arthur Acunto should be reversed and the indictment dismissed as to him.

Respectfully submitted,

PHILIP VITELLO,
Attorney for Petitioners.

HENRY J. BOITEL,
Of Counsel.

November , 1969.

APPENDICES

APPENDIX A

Judgment of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of September, one thousand nine hundred and sixty-nine.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARTHUR ACUNTO, et al.,
Defendants,

ARTHUR ACUNTO, EDWARD BAKER, RALPH MASCIOLA, DOMINICK DINORSCIO, etc., CARMINE PAONESSA and MARIO STEFANO,
Defendants-Appellants.

Appendix A

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments as to Arthur Acunto, Carmine Paonessa and Mario Stefano of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix A

Notice of Entry of Judgment.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

A. DANIEL FUSARO
Clerk

October 15, 1969

U.S.A. v. Arthur Acunto	U.S.A. v. Arthur Acunto	U.S.A. v. Arthur Acunto
U.S.A. v. Arthur Acunto	U.S.A. v. Arthur Acunto	U.S.A. v. Arthur Acunto

Dear Sirs:

The Court has today handed down a decision in the above entitled cause affirming the decision of the district court.

A copy of the opinion will be mailed to you tomorrow.

Additional copies of opinions may be obtained from this office in accordance with § 0.17(7) of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Very truly yours,

A. DANIEL FUSARO,
Clerk.

P. S. Your attention is directed to the provision of Rule 39(c) F.R.A.P. requiring the bill of costs, if any, to be filed within 14 days after entry of judgment.
#54-59

APPENDIX B

Constitutional Provisions and Statutes.

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 2

PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371

CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the

United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 659

Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into,

steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section

the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

APPENDIX C

Indictment.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

ARTHUR ACUNTO, EDWARD BAKER, RAMON COMER, a/k/a RAYMOND SLOAN, ROBERT HICKS, THOMAS LUDLOW, RALPH MASCIOLA, DOMINICK DI NORSCIO, VITO PANEPINTO, CARMINE PAONESSA, JOSEPH ROSELLI, MARIO STEFANO and ROLAND WARREN,

Defendants.

The Grand Jury charges:

1. From on or about the 1st day of August, 1966, up to and including on or about the 15th day of October, 1966, in the Southern District of New York and elsewhere, Arthur Acunto, Edward Baker, Ramon Comer, a/k/a Raymond Sloan, Robert Hicks, Thomas Ludlow, Ralph Masciola, Dominick Di Norscio, a/k/a Tommy Adams, Vito Panepinto, Carmine Paonessa, Joseph Roselli, Mario Stefano and Roland Warren, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jurors known and unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 659, 2312, 2314 and 2315.

2. It was a part of said conspiracy that the defendants would, with intent to convert to their own use, steal motor

trucks, tractor-trailers and other vehicles containing goods, chattels, wares and merchandise of a value of $5,000 and more, which were moving as, were part of and constituted interstate shipments of freight and express.

3. It was further a part of said conspiracy that the defendants would transport in interstate commerce said motor trucks, tractor-trailers and other vehicles and their said contents, referred to in paragraph 2 above, knowing the same to have been stolen.

4. It was further a part of said conspiracy that the defendants would buy, receive, conceal, sell and dispose of said stolen motor trucks, tractor-trailers and other vehicles and their said contents, referred to in paragraphs 2 and 3 above, after they had been transported in interstate commerce as aforesaid in paragraph 3 above, knowing the same to have been stolen.

Overt Acts

In pursuance of said conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about October 7, 1966, defendants Robert Hicks and Roland Warren traveled from Jersey City, New Jersey to New York, New York.

2. On or about October 7, 1966, in the vicinity of 23rd Street and 11th Avenue, New York, New York, defendants Robert Hicks and Roland Warren boarded a vehicle operated by Gilbert Carrier Corporation, to wit, a 1965 International tractor bearing New York registration No. 42428, and a trailer attached thereto bearing New York registration No. 559.

3. On or about October 7, 1966, in the vicinity of 23rd Street and 11th Avenue, New York, New York, defendants Robert Hicks and Roland Warren seized, kidnapped, abducted and carried away a person, to wit, George Manuel.

4. On or about October 13, 1966, defendants Edward Baker, Ramon Comer, a/k/a Raymond Sloan, and Roland Warren traveled from Jersey City, New Jersey to New York, New York.

5. On or about October 13, 1966, in the vicinity of Washington and Perry Streets, New York, New York, defendants Edward Baker, Ramon Comer, a/k/a Raymond Sloan, and Roland Warren approached a vehicle operated by Gilbert Carrier Corporation, to wit, a 1966 International tractor bearing New York registration No. 42431, and a trailer attached thereto bearing California registration No. WK 3408.

6. On or about October 13, 1966, in the vicinity of Washington and Perry Streets, New York, New York, defendants Edward Baker and Roland Warren seized, kidnapped, abducted and carried away a person, to wit, Arnaldo Medina.

(Title 18, United States Code, Section 371.)

Second Count

The Grand Jury further charges:

On or about the 7th day of October, 1966, in the Southern District of New York, Arthur Acunto, Robert Hicks, Thomas Ludlow, Vito Panepinto, Carmine Paonessa, Joseph Roselli, Mario Stefano and Roland Warren, the defendants, unlawfully, wilfully and knowingly and with intent to convert to their own use, did steal a vehicle

operated by Gilbert Carrier Corporation, to wit, a 1965 International tractor bearing New York registration No. 42428, and a trailer attached thereto bearing New York registration No. 559 and containing chattels of a value more than $100.00, to wit, women's suits, coats, blouses and skirts and other garments, which were moving as, were part of and constituted an interstate shipment of freight and express from New York, New York to Michigan.

(Title 18, United States Code, Sections 659 and 2.)

Third Count

The Grand Jury further charges:

On or about the 13th day of October, 1966, in the Southern District of New York, Edward Baker, Ramon Comer, a/k/a Raymond Sloan, Ralph Masciola, Dominick Di Norsico, a/k/a Tommy Adams, Vito Panepinto, Joseph Roselli and Roland Warren, the defendants, unlawfully, wilfully and knowingly and with intent to convert to their own use, did steal a vehicle operated by Gilbert Carrier Corporation, to wit, a 1966 International tractor bearing New York registration No. 42431, and a trailer attached thereto bearing California registration No. WK 3408 and containing goods and chattels of a value more than $100.00, to wit, approximately 13,517 men's and women's finished garments, which were moving as, were part of and constituted an interstate shipment of freight and express from New York, New York to California.

(Title 18, United States Code, Sections 659 and 2.)

Fourth Count

The Grand Jury further charges:

1. On or about the 13th day of October, 1966, Edward Baker, Ramon Comer, a/k/a Raymond Sloan, Ralph Masciola, Dominick Di Norscio, a/k/a Tommy Adams, Vito

Panepinto, Joseph Roselli and Roland Warren, the defendants, unlawfully, wilfully and knowingly did transport in interstate commerce from New York, New York, in the Southern District of New York to Jersey City, New Jersey, a person, to wit, Arnaldo Medina, who had theretofore been unlawfully seized, kidnapped, abducted, carried away and held by said defendants for the purpose of preventing said Arnaldo Medina from notifying the police that he had been robbed of a motor vehicle he had been operating.

2. Said defendants did thereafter liberate said Arnaldo Medina unharmed.

(Title 18, United States Code, Sections 1201 and 2.)

Fifth Count

The Grand Jury further charges:

On or about the 13th day of October, 1966, Edward Baker, Ramon Comer, a/k/a Raymond Sloan, Ralph Masciola, Dominick Di Norscio, a/k/a Tommy Adams, Vito Panepinto, Joseph Roselli and Roland Warren, the defendants, unlawfully, wilfully and knowingly did transport in interstate commerce from New York, New York, in the Southern District of New York to Newark, New Jersey, goods, wares and merchandise of a value of $5,000 and more, to wit, a 1966 International tractor, bearing New York registration No. 42431, and a trailer attached thereto bearing California registration No. WK 3408 and containing approximately 13,517 men's and women's finished garments, knowing the same to have been stolen.

(Title 18, United States Code, Sections 2314 and 2.)

. . . . . .
FOREMAN

. . . . . .
ROBERT M. MORGENTHAU
United States Attorney

APPENDIX D

Judgment and Commitment Appealed From.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. 67 Cr. 153

UNITED STATES OF AMERICA

v.

ARTHUR ACUNTO

On this 12th day of March, 1969, came the attorney for the government and the defendant appeared in person and[1] by counsel

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly and with intent to convert to his own use, stealing a tractor and trailer containing chattels of a value of more than $100.00, which constituted an interstate shipment of freight and express, (Title 18, United States Code, Sections 659 and 2) as charged[3] in count 1 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] two years on count 2. Bail pending appeal is fixed in the sum of $10,000.

Appendix D

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve is the commitment of the defendant.

MILTON POLLACK,
United States District Judge.
JOHN LIVINGSTON,
Clerk.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. 67 Cr. 153

UNITED STATES OF AMERICA

v.

CARMINE PAONESSA

On this 12th day of March, 1969, came the attorney for the government and the defendant appeared in person and[1] by counsel

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly and with intent to convert to his own use, stealing a tractor and trailer containing chattels of a value of more than $100.00, which constituted an interstate shipment of freight and express, (Title 18, United States Code, Section 659 and 2) and conspiring so to do. (Title 18, United States Code, Section 371) as charged[3] in counts 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Appendix D

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] three (3) years on each of counts 1 and 2 to run concurrently with each other. Bail pending appeal is fixed in the sum of $15,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve is the commitment of the defendant.

MILTON POLLACK,
United States District Judge.
JOHN LIVINGSTON,
Clerk.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. 67 Cr. 153

UNITED STATES OF AMERICA

v.

MARIO STEFANO

On this 12th day of March, 1969, came the attorney for the government and the defendant appeared in person and[1] by counsel

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly and with intent to convert to his own use, stealing a tractor

and trailer containing chattels of a value of more than $100.00, which constituted an interstate shipment of freight and express, (Title 18, United States Code, Sections 659 and 2) and conspiring so to do. (Title 18, United States Code, Section 371) as charged[3] in counts 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Five (5) Years on each of counts 1 and 2 to run concurrently with each other. Defendant is to surrender his passport to the United States Attorney. Bail pending appeal is fixed in the sum of $15,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve is the commitment of the defendant.

MILTON POLLACK,
United States District Judge.
JOHN LIVINGSTON,
Clerk.

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In The

Supreme Court of the United States

October Term, 1969

No. 902

DOMINICK DI NORSCIO and RALPH MASCIOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969

No.

DOMINICK DI NORSCIO and
RALPH MASCIOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Dominick Di Norscio and Ralph Masciola, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on October 15, 1969 which judgment affirmed a judgment of conviction and sentence of the United States District Court for the Southern District of New York, filed on March 12, 1969.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, infra, has not as yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did not the lower court's ruling upholding the refusal of the main government witness to reveal his place of employment violate the rule of Smith v. Illinois, 390 U.S. 129 (1968)?

2. Is there not a conflict among the Courts of Appeals in applying Smith v. Illinois and have not those decisions effectively emasculated the holding of that case?

3. Did not the lower court's ruling that the sufficiency of the evidence concerning a defendant's membership in a conspiracy, based upon his own acts and declarations, is a preliminary question for the judge and, once decided, is not to be re-submitted to the jury, deprive petitioners of due process of law and their right to trial by jury, and are not the rulings of the Courts of Appeals on this question in conflict?

4. Should not Di Norscio have been acquitted of the conspiracy charged where the proof showed, at best, that he was merely associated with those who purchased the goods from the thief?

5. Were not the verdicts in the instant case inconsistent as to Di Norscio and, if so, should not the rule of Dunn v. United States, 284 U.S. 390 (1932), be reconsidered and abandoned?

STATUTES INVOLVED

The statutory provisions involved are 18 U.S.C. Sections 2, 371, 659, 2312, 2314 and 2315. They are printed in Appendix B, infra.

STATEMENT

Petitioners, Di Norscio and Masciola were charged in four counts of a five count indictment along with ten other persons. The First Count charged a conspiracy to steal vehicles in interstate commerce, transport the trucks and their contents in interstate commerce, and to dispose of the contents after they had moved in interstate commerce (7a-10a).* The Third Count charged the substantive offense of stealing a certain vehicle and its contents which were moving in interstate commerce (11a-12a). The Fourth Count charged the kidnapping of the driver of the stolen vehicle (12a-13a), and the Fifth Count charged the transporting of the stolen goods in interstate commerce (13a-14a). The trial of these defendants was severed from that of other defendants and they proceeded to trial only with Edward Baker. At the conclusion of the Government's case, the court dismissed the kidnapping count as to these petitioners. Masciola was convicted on both substantive counts, as well as on the conspiracy charge. Defendant Di Norscio was acquitted on the substantive counts and convicted only of the conspiracy. On March 12, 1969, Masciola was sentenced to five years on the conspiracy charge

* "a" refers to the record abstract printed as appellant's appendix in the United States Court of Appeals for the Second Circuit which appendix has been certified and filed with this petition as a part of the official record below.

and seven years on each substantive count, all the sentences to run concurrently (197a-198a). Di Norscio was sentenced on the conspiracy count to a term of five years and a committed fine of $5,000 (199a-200a).

Testimony at the trial proved that in the second week of October, 1966 a truck, carrying merchandise moving in interstate commerce, was hijacked in New York City and thence transported, along with the driver, to Jersey City, New Jersey. The driver tentatively identified the defendant Baker as one of the men who participated in the theft.

The main Government witness was Roland Warren, an alleged accomplice who was named as a co-defendant in this indictment. Warren testified that during the period October 7 to 13, 1966, he met a man named Joseph Roselli at a bar in Newark (19a-20a). Roselli had died prior to the trial (19a). Roselli told Warren that he knew some people that wanted to buy a load of clothes from Gilbert Carriers and he suggested that Warren steal another load (21a). Warren was hesitant because he had not been paid for the previous load he had stolen (21a-22a). The next day or so Roselli again approached Warren at this bar and asked him to come with him and meet the people who wanted to buy the load (23a). They went to a house on Boylan Street in Newark (23a) where Warren met several men, Vito, Ralph and Danny (24a). The house belonged to Ralph (24a), who was identified as the petitioner Masciola (25a). Ralph asked Warren if he could take another "shot" at Gilbert and told Warren that he need not worry about not being paid (25a). Warren then

agreed to try it again (26a). The next day Warren met Roselli again. He told him that he had come from Ralph's house and they were ready for him to steal the truck (27a). Warren replied that he had to find someone to help him (27a). Warren and Roselli agreed to meet again that night in a diner in Jersey City. During that day Warren was approached by the defendants, Baker and Ramon Comer, both of whom were interested in making some money by helping Warren steal a truck (28a-32a). Warren met Roselli that evening in Jersey City along with Baker and Comer (32a). It was agreed that Baker would hold up the driver, Warren would drive the truck and Comer would drive their car (33a). Roselli told Warren that as soon as he got the truck he should call a certain number and then go to the Club 36 in Newark (33a-34a). He indicated that the number was at Ralph's house (34a). Warren then described how he, Baker and Comer, traveled to New York City and stole the truck (34a-36a). They locked up the driver in a truck in Jersey City and then called the phone number previously given by Roselli (37a-38a). He parked the truck nearby and walked to the Club 36, in Newark (38a). After 15 or 20 minutes in the bar, Roselli, Ralph and Vito came in (39a). After a call was made, they then left the club and went to another bar on Wilson Avenue (39a-40a). Roselli and Masciola stayed outside, saying that they were going to wait for the buyer to arrive (40a). Some time later, Warren was beckoned outside where a third party was counting out money to Roselli (40a-41a). Warren then followed the buyer to the "drop" in Passaic (42a). Warren was promised the balance of his money in the morning (43a). Warren called Roselli all the next day and finally arranged to go to Passaic with him the following morning (43a-44a). They

went to Passaic and parked, leaving Warren in the car (44a). After about two hours in the car, Warren got out and walked towards the corner where he saw Roselli waiting for someone in a phone booth (45a). Roselli introduced him to this man, who was called "Tommy Adams," and who was identified as Defendant Di Norscio (45a). Di Norscio told Warren that the load was not the best since it contained a lot of maternity clothes. He told him that if

> "...these guys don't do something with it by this evening, I am going to get some trucks and get it out of there myself" (45a).

Warren indicated that he wanted the rest of his money and Di Norscio gave him a hundred dollars and told him that that would hold him over until they see what they can do with the rest of the clothes (45a-46a).

On cross-examination Warren was asked where he worked. The court sustained a Government objection to this question and then indicated that the matter would be pursued later (62a). The following morning the matter was argued further (66a-69a), and the court indicated a disposition to permit the questions (69a-73a). However, when counsel again asked the question, Warren refused to answer it (79a-80a). The trial judge then interrogated the witness on a voir dire. Warren testified that he was afraid of Masciola dn Di Norscio (96a-103a). Warren stated that he had been threatened "indirectly... in other cases" (98a) but admitted that he had not been threatened by either Di Norscio or Masciola (98a). Warren based his fear of Masciola upon the fact that at one time Masciola had allegedly

2. In its final instructions, the court charged that the jury's first task was to determine whether beyond a reasonable doubt the charged conspiracy was shown to have existed (R. 432). They were told that only after such a finding should they consider whether each defendant was shown beyond a reasonable doubt to have knowingly and wilfully become a member of the conspiracy (R. 432). The court then gave the instruction of which petitioners complain (Pet. in No. 902, p. 13) that the participation of any defendant in the conspiracy could be determined from evidence of his own acts and statements and the acts and statements of other alleged members (R. 433). As petitioners admit, this instruction is in accord with the rule in the Second and Ninth Circuits. *United States* v. *Nuccio,* 373 F. 2d 168 (C.A. 2), certiorari denied, 387 U.S. 906; *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. The older practice, as exemplified in the cases cited by petitioner, was to charge that, while all the evidence could be considered in determining whether a conspiracy existed, the jury must determine from independent proof of the defendant's own acts that he was a member of the conspiracy, and then could consider acts and declarations of co-conspirators in determining guilt beyond a reasonable doubt. The present rule in the Second and Ninth Circuit results in a presentation of the issues to the jury in a simpler and more comprehensible fashion than was required under the older procedure while, at the same time, it safeguards the rights of the defendant in that the judge must determine, as a

matter of law, whether the evidence of his membership in the conspiracy is sufficient to warrant submission of that issue to the jury.

In any event, the manner in which the jury was instructed on this aspect of the issue was of no real significance in the present case. This was not a case in which the proof of petitioners' participation depended on declarations by co-conspirators. Masciola was shown to have been directly involved in the planning of the theft of the truck as well as the theft itself. As to DiNorscio, the evidence was entirely of his own acts and declarations. There were no hearsay declarations as to him. As discussed below, the jury had a right to believe from his own acts that he had known of and joined in the conspiracy to hijack even though the evidence related to what he did after the hijacking occurred.

3. DiNorscio contends he should have been acquitted of the conspiracy charge since the evidence, at most, showed him involved only in the distribution of stolen goods. It is true that absent proof of any prior or contemporaneous agreement, the acts of buying and selling stolen goods do not constitute the crime of conspiracy. That more than a sales agreement was involved here, however, is evident from petitioner's own acts, declarations and conduct. The jury could reasonably conclude that when he paid Warren $100, he did so with full knowledge of Warren's role, acquired before the hijacking took place, and that his own role as receiver and distributor of the stolen goods was part of the overall plan. It was not inconsistent for

the jury to find that he was involved in the overall plan but not so intimately involved in the substantive crime that the jury would wish to hold him responsible therefor.

4. Petitioner Baker's contention that the identification procedure followed here was violative of due process is adequately answered by the opinion below. Voir dire indicated that the truck driver's identification would be based upon extended personal observations. That it was unclouded by alleged improper suggestion is evidenced by the witness' insistence upon seeing Baker in person before he could state whether or not Baker was the gunman. Defense counsel's decision to proceed at that point, without more, was a free choice of trial strategy. Moreover, Warren, the government's principal witness, whose credibility was resolved by the jury in his favor, likewise identified Baker as the gunman in the hijacking.

5. At the close of the government's case the trial judge stated outside the presence of the jury:

* * *

> Yes, I dismiss count 3 as to the defendant Baker on the ground that that was tied in with the other conduct and that the element of criminal intent is missing. [R. 401.]

The prosecutor then urged upon the court cases supporting Baker's culpability under the kidnapping count. After a few minutes of study, the court announced:

> * * * what I have done is to revise my statements of the ruling with respect to the defendant Baker and under the authority of *United*

> *States* v. *Healey* in 376 U.S. 75 (1964), I hold that the motion with respect to the * * * kidnapping count * * * is denied.

Defense counsel objected that such a ruling "constitutes a second and further jeopardy * * *" (R. 405). The court stated:

> * * * I think that it is always permissible to the court to correct an inadvertence as an immediate matter during the course of argument of motions and in the absence of the jury and prior to the continuance of the trial. [R. 405.]

The court was clearly correct in so ruling. *Fong Foo* v. *United States,* 369 U.S. 141, on which petitioner relies, is not controlling here. In that case the court, during the government's case, had directed the jury to return a verdict of acquittal, and formal judgments of acquittal were subsequently entered. This Court ruled that the indictment terminated with the entry of the final judgment of acquittal and that judgment could not be reviewed without putting the petitioners twice in jeopardy. In the instant case, no final judgment had been entered. The effect of the trial court's almost immediate ruling was not to reindict Baker, but simply to correct a statement made during the course of argument.

6. Baker was arrested in his sister's apartment and was given a full *Miranda* warning. As the agents were searching, Baker asked if the agents were looking for the guns. On being told that they were, he proceeded a few steps back into the bedroom where he had been hiding when arrested and pointed to a drawer which he said contained a sack with the guns

(R. 336–352, 365–367). Baker urges in this Court that the guns should have been excluded under the rationale of *Chimel* v. *California*, 395 U.S. 752. The courts of appeals which have considered the question of the retroactivity of *Chimel* have concluded that the ruling ought not to be applied to searches, like the one here, conducted prior to the date of the decision therein. *United States* v. *Bennett, et al.*, 415 F. 2d 1113 (C.A. 2), decided September 9, 1969, petition for a writ of certiorari pending, No. 1249 Misc., this Term; *Lyon* v. *United States*, 413 F. 2d 186 (C.A. 5), petition for a writ of certiorari pending, No. 1072 Misc., this Term. Moreover, in light of the direct evidence of Baker's role, the guns were not significant evidence. The driver of the truck could not identify them as the ones used in the hijacking (R. 90).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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